Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24NCC(ARB)-25 OF 2011 AND 244NCC(ARB)-37 OF 2010/2011
MARY LIM J
16 DECEMBER 2011

Arbitration — Award — Challenging arbitration award — Application to recognise and enforce foreign arbitration awards — Tribunal's jurisdiction to make awards questioned — Whether any arbitration agreement existed for tribunal to assume jurisdiction to arbitrate — Whether recognising and enforcing court could inquire into tribunal's lack of jurisdiction when point not raised before tribunal — Whether challenge to jurisdiction barred by estoppel

The plaintiffs in the two originating summonses, Food Ingredients LLC and Agrovenus LLP, both incorporated in the United Kingdom, entered into identical contracts with the Malaysian-registered defendant, Pacific Inter-Link Sdn Bhd, to buy certain goods from the latter ('the contract'). The agreed freight rate for the shipment of the goods had been worked into the price of the goods. After the goods had been delivered and the plaintiffs had paid the monies due under the contract, representatives of the plaintiffs and defendant met in Istanbul where it was purportedly orally agreed that the freight rate for the goods delivered would be reduced by a certain margin. A draft memorandum of understanding ('MOU') for that purpose was drawn up but it was never signed. By email, the plaintiffs suggested to the defendant that since the reduction in freight rate was agreed, the payments that had been made for the recently delivered shipments would be considered an over-payment which could be deducted from the price of commodities to be delivered under future contracts. The defendant's rejected the suggestion. The plaintiffs then issued a demand for payment of the over-paid freight and when this was ignored by the defendant, the plaintiffs declared a dispute had arisen and referred the matter for arbitration pursuant to cl 6 of the contract. The arbitral tribunal ('the tribunal'), which sat in England, found in the plaintiffs' favour and handed down identical awards in respect of the contract. By the instant originating summonses, the plaintiffs applied for recognition and enforcement of the awards in Malaysia. The defendant opposed the applications claiming they should be dismissed under s 39(1)(a)(ii), (iv) and (v) of the Arbitration Act 2005 ('the Act'). The defendant argued that the awards were not valid as the tribunal had no jurisdiction to hear and determine the dispute as to whether or not an agreement to grant rebate on the freight existed. Since the issue of freight reduction was to be made the subject of the MOU and the draft of that

document did not contain any arbitration clause, the dispute over the existence or otherwise of the freight reduction agreement was not arbitrable. The defendant also said its failure to raise this objection at the arbitration proceedings was irrelevant and it was not estopped from raising the issue before the court. The plaintiffs said that by participating in the tribunal proceedings without objection, the defendant was estopped from questioning its jurisdiction at the enforcement stage. The plaintiffs said referral to arbitration was made pursuant to cl 6 of the contract and not pursuant to the MOU.

Held, dismissing the applications with costs:

(1) While the original written contract formed the principal contract between the parties, the matter of reduction of the freight was not to be found in the contract at all. Instead, if it existed, it was housed in an oral contract concluded subsequently at Istanbul (see para 93).

(2) The dispute before the tribunal to determine the existence of an agreement to reduce freight did not come within the intent and scope of cl 6 of the contract. For there to be a valid arbitration agreement, there had to be evidence before the court that the parties had agreed in Istanbul that any dispute on the freight rebate would be resolved by arbitration (see paras 94 & 98).

(3) The draft MOU concerning the freight reduction had no provision for arbitration and there was also no evidence the parties had agreed to extend the terms of cl 6 to the agreement on freight reduction (see paras 101 & 102).

(4) Since there was no arbitration agreement and cl 6 of the contract could not validly incorporate the particular dispute before the tribunal, there was no valid arbitration agreement from which the tribunal could validly render an award (see para 103).

(5) Even if there was an oral arbitration agreement — forming part of the oral agreement to reduce freight — that was insufficient for the court to grant the order of recognition and enforcement as there was no room in the Act for oral arbitration agreements (see para 104).

(6) The recognising or enforcing court was entitled, if not bound, to inquire fully into the matter of jurisdiction or lack of jurisdiction of the tribunal in making its award, regardless of whether the issue was raised for the first time before the court or whether it had been raised before and was already considered by the tribunal (see paras 63 & 62).

(7) The mere fact the parties had submitted to the tribunal was insufficient to cloak it with jurisdiction to hear and determine the dispute as to whether there was an agreement to grant the freight rebate (see para 101).

[Bahasa Malaysia summary

Plaintif-plaintif dalam dua saman pemula, Food Ingredients LLC dan Agrovenus LLP, kedua-duanya diperbadankan di United Kingdom, telah memasuki kontrak yang sama dengan defendan yang didaftarkan di Malaysia, Pacific Inter-Link Sdn Bhd, untuk membayar barangan tertentu daripadanya ('kontrak tersebut'). Tambang muatan yang dipersetujui untuk pengangkutan barangan tersebut adalah pada harga barangan tersebut. Selepas barangan tersebut dihantar dan plaintif-plaintif telah membayar wang yang kena dibayar di bawah kontrak tersebut, wakil-wakil plaintif-plaintif dan defendan telah bertemu di Istanbul di mana dikatakan tambang muatan telah dipersetujui secara lisan untuk barangan yang dihantar tersebut akan dikurangkan pada kadar margin tertentu. Satu draf memorandum persefahaman ('MP') bagi tujuan tersebut telah dibuat tetapi tidak ditandatangani. Melalui e-mel, plaintif-plaintif mencadangkan kepada defendan bahawa oleh kerana pengurangan tambang muatan telah dipersetujui, bayaran-bayaran yang telah dibuat untuk pengangkutan yang baru dihantar adalah dianggap terlebih bayar yang mana boleh dipotong daripada harga komoditi yang dihantar di bawah kontrak masa hadapan. Defendan-defendan menolak cadangan tersebut. Plaintif-plaintif kemudian telah mengeluarkan tuntutan untuk bayaran tambang muatan yang terlebih bayar itu dan apabila ini tidak dihiraukan oleh defendan-defendan, plaintif-plaintif telah mengisytiharkan pertikaian telah timbul dan merujuk perkara tersebut kepada timbang tara menurut fasal 6 kontrak tersebut. Tribunal timbang tara ('tribunal tersebut'), yang diadakan di England, membuat keputusan menyebelahi plaintif dan menyampaikan award-award sama berkaitan kontrak tersebut. Melalui saman pemula ini, plaintif-plaintif memohon pengiktirafan dan penguatkuasaan award-award tersebut di Malaysia. Defendan telah membantah permohonan dengan mendakwa bahawa ia patut ditolak di bawah s 39(1)(a)(ii), (iv) dan (v) Akta Timbangtara 2005 ('Akta tersebut'). Defendan berhujah bahawa award-award tersebut tidak sah kerana tribunal tersebut tiada bidang kuasa untuk mendengar pertikaian sama ada atau tidak perjanjian untuk memberikan rebet untuk tambang muatan itu wujud. Oleh kerana isu pengurangan tambang muatan dibuat tertakluk kepada MP dan draf dokumen itu tidak mengandungi apa-apa fasal berhubung timbang tara, pertikaian berhubung kewujudan atau sebaliknya berhubung perjanjian pengurangan tambang muatan tidak boleh dirujuk kepada timbang tara. Defendan juga mengatakan bahawa kegagalannya menimbulkan bantahan ini di prosiding timbang tara tidak relevan dan ia tidak diestopkan daripada menimbulkan isu-isu tersebut di hadapan mahkamah. Plaintif-plaintif mengatakan bahawa dengan penglibatan dalam prosiding tribunal tersebut tanpa bantahan, defendan diestopkan daripada menyoal bidang kuasanya di peringkat penguatkuasaan. Plaintif-plaintif mengatakan rujukan ke timbang tara dibuat menurut fasal 6 kontrak tersebut dan bukan menurut MP.

Diputuskan, menolak permohonan-permohonan dengan kos:

(1) Walaupun kontrak bertulis asal membentuk kontrak utama antara

pihak-pihak, perkara berhubung pengurangan tambang muatan tidak terdapat langsung dalam kontrak tersebut. Sebaliknya, jika wujud, ia terdapat dalam kontrak lisan yang diputuskan kemudian di Istanbul (lihat perenggan 93).

(2) Pertikaian di hadapan tribunal untuk menentukan kewujudan perjanjian untuk mengurangkan tambang muatan tidak terdapat dalam niat dan skop fasal 6 kontrak tersebut. Untuk wujud satu perjanjian timbang tara yang sah, perlu terdapat keterangan di hadapan mahkamah bahawa pihak-pihak telah bersetuju di Istanbul bahawa apa-apa pertikaaian ke atas rebet tambang muatan boleh diselesaikan oleh timbang tara (lihat perenggan 94 & 98).

(3) Draf MP berkaitan pengurangan tambang muatan tidak mempunyai peruntukan untuk timbang tara dan juga tiada keterangan yang pihak-pihak telah bersetuju untuk melanjutkan terma-terma fasal 6 perjanjian berhubung pengurangan tambang muatan tersebut (lihat perenggan 101–102).

(4) Oleh kerana tiada perjanjian timbang tara dan fasal 6 kontrak tersebut tidak boleh secara sah memasukkan pertikaian tertentu di hadapan tribunal tersebut, tiada perjanjian timbang tara yang sah yang mana tribunal tersebut boleh memberikan award dengan sah (lihat perenggan 103).

(5) Jikapun terdapat perjanjian timbang tara lisan — yang membentuk sebahagian daripada perjanjian lisan untuk mengurangkan tambang muatan — ia tidak mencukupi untuk mahkamah memberikan perintah pengiktirafan dan penguatkuasaan kerana tiada ruang dalam Akta tersebut untuk perjanjian timbang tara lisan (lihat perenggan 104).

(6) Mahkamah yang mengiktiraf atau menguatkuasakan itu berhak, jika tidak terikat, untuk menyiasat sepenuhnya tentang perkara mengenai bidang kuasa tribunal tersebut dalam membuat awardnya, tanpa menghiraukan sama ada isu yang ditimbulkan untuk pertama kali di mahkamah atau sama ada ia telah ditimbulkan sebelumnya dan telah pun dipertimbangkan oleh tribunal tersebut (lihat perenggan 63 & 62).

(7) Hakikat bahawa pihak-pihak telah berhujah kepada tribunal tidak mencukupi untuk melengkapkannya dengan bidang kuasa untuk mendengar dan menentukan pertikaian berhubung sama ada terdapat perjanjian untuk memberikan rebet tambang muatan tersebut (lihat perenggan 101).]

Notes

For cases on challenging arbitration award, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1556–1558.

Cases referred to

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR 174, HC (refd)

Azov Shipping Co v Baltic Shipping Co [1999] 1 All ER 476, QBD (refd)

China Minmetals Minerals Import and Export Co Ltd v Chi Mei Corp (2003) 334 F 3d 274, CA (folld)

Dallah Real Estate and Tourism Co v Ministry of Religious Affairs, Government of Pakistan [2010] 3 WLR 1472, SC (folld)

Denmark Skibstekniske Konsulenter A/S Likvidation n (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd) [2010] 3 SLR 661, HC (refd)

Federal Bulk Carriers INC v C Itoh & Co Ltd & Ors [1989] 1 Lloyd's Rep 103, CA (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49; [2003] 1 CLJ 103, CA (refd)

Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2011] 1 SLR 727; [2010] SGHC 304, CA (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)

Heyman and another v Darwins, Ltd [1942] AC 356, HL (refd)

Manchester Trust v Furness [1895] 2 QB 539, CA (refd)

Newspeed International Ltd v Citus Trading Pte Ltd [2003] 3 SLR (R) 1, HC (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332; [1988] 2 CLJ 82, HC (refd)

Pacific Inter-Link Sdn Bhd v EFKO Food Ingredients Ltd [2011] EWHC 923 (refd)

Paklito Investment Ltd v Klockner East Asia Ltd and another [1993] 2 HKLR 39, HC (refd)

Peterson Farms Inc v C & M Farming Ltd [2004] 1 Lloyd's Rep 603 (refd)

Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep 14, QBD (refd)

Svenska Petroleum Exploration Bank of Allahabad v Government of the Republic of Lithuania and another (No 2) [2007] QB 886, CA (refd)

TW Thomas & Co Ltd v Portsea Steamship Co Ltd [1912] AC 1, HL (refd)

Legislation referred to

Arbitration Act 1996 [UK] ss 31, 67, 73, 103, 103(2)(b), (5)

Arbitration Act 2005 ss 10, 38, 38(1)(b), (2)(b), 39, 39(1)(a)(i), (a)(ii), (a)(iii), (a)(iv), (a)(v), (a)(vi), (a)(vii), (1)(b), (1)(b)(i), (1)(b)(ii), 51(3), (4)

Companies Act 1985 [UK]

International Arbitration Act 2002 [SG] s 31(2)(b)

Sales of Goods Act 1979 [UK]

Shirley Hor (Raja, Darryl & Loh) for the plaintiff.

Arun Krishnalingam (Sativale Mathew Arun) for the defendant.

Mary Lim J:

INTRODUCTION

[1] The two applications before the court are for the recognition and enforcement of two separate arbitral awards dated 12 January 2011 issued by the same tribunal involving the same group of companies and arising from the same factual background — *D24NCC(ARB)-25 of 2011* and *D24NCC(ARB)-37 of 2010/2011*.

[2] The plaintiffs in both applications are companies incorporated in the United Kingdom. They were the claimants in the arbitrations leading to the two awards. I shall refer to the plaintiff in 24NCC(ARB)-25 of 2011 as 'Food Ingredients LLC' and the plaintiff in 24NCC(ARB)-37 of 2010/2011 as 'Agrovenus LLP'. The defendant is a company registered in Malaysia. It is the same respondent in both arbitral proceedings. The plaintiffs' applications are supported by the affidavits deposed by Eugene Blinov, the lawyer who was the plaintiffs' counsel in the arbitral proceedings and as such claimed to have personal knowledge of the matters concerned. He affirmed the supporting affidavit further on the strength of a power of attorney granted by the respective plaintiffs to him and two others from his firm of lawyers known as 'Astapov Lawyers International Law Group' on 12 April 2010. The application is opposed by the defendant and the reasons appear in the affidavit in reply of Nakul Rastogi, the Commodities Trading Manager of the defendant. The deponents' affidavits in both applications are substantially the same differing only in the obvious particulars.

[3] The issues arising in both applications are similar and common. The parties have therefore sensibly agreed that the decision in *D24NCC(ARB)-25 of 2011* will bind them in the second application in *D24NCC(ARB)-37 of 2010/2011*. However, wherever necessary, I shall point out certain pertinent facts in *D24NCC(ARB)-37 of 10/2011* so that the conditions on the ground may be better appreciated.

BACKGROUND FACTS

[4] Food Ingredients LLC and the defendant entered into a contract (No PIL/PO/18/08) dated 3 April 2009 where the defendant agreed to sell and Agrovenus LLP agreed to buy in bulk 5,000 metric tons of RBD Palm Olein and 1,000 metric tons of RBD Palm Kernel Oil ('the said contract'). The agreed freight rate was USD100 per ton. The shipment period was from 1st–31st March with arrival period from 1st–30 April 2009. The delivery was via MT Miss Marilena from Malaysia/Indonesia to Port Izmit, Turkey for

transshipment on FOB INCOTERMS-2000. The value of the said contract was USD5,069,250 +/- 5%. The plaintiff agreed to effect payment for 98% of the defendant's provisional invoice within four banking days from the date of presentation to the plaintiff's bank of the documents specified in cl 3 of the said contract.

[5] In the related application, Agrovenus LLP and the defendant entered into a contract (No PIL/PO/17/09) also dated 3 April 2009 where the defendant agreed to sell and Agrovenus LLP agreed to buy 5,000 metric tons of RBD Palm Olein in bulk, 1,000 metric tons of RBD Palm Kernel Oil in bulk, 2,000 metric tons of RBD Palm Oil in bulk and 500 metric tons of Coconut Oil in bulk. The value of this contract was USD6,863,260 +/- 5%. The agreed freight rate was also USD100 per ton.

[6] In both contracts, the agreed freight rate was already worked into the price of the commodities concerned and both contracts were therefore understood as fixed price contracts. In the case of contract No PIL/PO/18/08, the contract price was fixed at USD849.75 per metric ton for RBD Palm Oil Olien and USD820.50 per metric ton for RBD Palm kernel Oil.

[7] On 23 April 2009, the commodities under the said contract were delivered and transshipped on board the plaintiff's tanker at MT Chingiz Mustafayev at Port Izmit. In relation to contract No PIL/PO/17/09, the commodities ordered were delivered on the MT Miss Marilena to Odessa.

[8] On 10 April 2009, the parties' representatives met at Hotel Swissotel Bosphorus in Istanbul to discuss a number of issues on various contracts between the parties. Mr Lyashenko and Mr Astapov represented Food Ingredients LLC, Agrovenus LLP and another company known as EFKO Food Ingredients Ltd; whereas a Mr Marwan represented the defendant. The meeting purportedly culminated in an agreement that the freight rate for all the commodities delivered on board MT Miss Marilena be reduced from USD100 to USD70 per ton. It must be pointed out that if this was indeed the agreement between the parties, then this would cover the commodities delivered under contracts Nos PIL/PO/17/09, PIL/PO/19/09 and PIL/PO/18/09. A draft memorandum of understanding was drawn up on 13 April 2009. Unfortunately, that MOU was not signed and it remained unsigned. It is not disputed that at the time of this meeting, the commodities concerned had already been delivered and the plaintiff had also paid the monies due under the respective contracts.

[9] By email dated 21 April 2009, the plaintiff contacted the defendant with a proposal to deduct the price for commodities to be delivered under future contracts from the monies already paid for the commodities delivered on board

MT Miss Marilena. As mentioned earlier, this would have included the commodities delivered under the two contracts related here (No PIL/PO/18/08 and No PI L/PO/17/08). The plaintiff considered that with the agreed freight reduction, it had now over-paid. The defendant was either to issue a credit note or use the over-payment towards future dues for the commodities to be delivered using MT Orinoco Star and payments under another contract, namely PIL/PO/20/09. The fate of two other potential contracts (PIL/PO/22/09 and PIL/PO/23/09) were also said to 'hang in the balance' depending on the outcome of this. The first contract was to have been between Food Ingredients Ltd and the defendant whilst the latter was between EFKO Food Ingredients LLC and the defendant.

[10] As it turned out, the defendant 'rejected and refuted' the plaintiff's stance. This led to the plaintiff causing its solicitors to issue a formal legal notice claiming for '… the difference between the paid and reconsidered freight rate for the delivery of the goods as per the Contract No. PIL-PO-17-09', that is payment of the overpayments. When this was ignored by the defendant, the plaintiff declared that a dispute had arisen and referred the dispute to arbitration pursuant to cl 6 of the said contract.

[11] The arbitration proceeded before the tribunal comprising Mr K Haylock, Mr W Busch and Mr BA Tappy as 'Arbitrators'. Mr K Haylock was the tribunal's umpire when the earlier arbitrators were unable to reach an agreement. Upon parties' agreement, the arbitration proceeded on documents only without any oral hearing. After evidence and submissions had been offered by both parties, the Umpire issued the respective awards. Award of Arbitration No 4170 is in respect of contract No PIL/PO/18/08 *(D24NCC(ARB)-25 of 2011)* whereas Award of Arbitration No 4171 is in respect of contract No PIL/PO/18/08 *(D24NCC(ARB)-37 of 2010/2011)*. In substance, both awards are the same.

[12] The applications for recognition and enforcement of the award are resisted by the defendant who claimed that recognition or enforcement of the award ought to be refused under subparas 39(1)(a)(ii), (iv) and (v) of the Arbitration Act of 2005 ('Act 646').

SECTION 38 OF THE ARBITRATION ACT 2005 ('ACT 646')

[13] The defendant first raised a preliminary issue concerning the non-fulfillment of the requirements of s 38 of Act 646. In summary, the defendant contended that the plaintiff had failed to produce the 'original arbitration agreement or a duly certified copy of the agreement' as is required under para 38(2)(b).

[14] Miss Shirley Hor, learned counsel for the plaintiff submitted that as explained by Mr Eugene Blinov on behalf of the applicant in his affidavit, this condition could not be fulfilled because the said contract was only prepared in an electronic form. As such, it was impossible to produce the original copy.

[15] After hearing the responses of both counsel on this matter, I directed the plaintiff to file an electronic copy of the said contract since filing in the court registry is now done electronically through a system known as 'e-filing'. Alternatively, a duly certified copy of the said contract as was envisaged under para 38(1)(b) could be filed. This is what is provided under s 38:

> 38 Recognition and enforcement
>
> (1) On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.
>
> (2) In an application under subsection (1) the applicant shall produce —
>
> (a) the duly authenticated original award or a duly certified copy of the award; and
>
> (b) the original arbitration agreement or a duly certified copy of the agreement.

[16] In my view, in the interest of justice, some relaxation and accommodation ought to be granted in this respect so that the more substantive and real issues on the recognition and enforcement of the award can be properly addressed. Practitioners and interested parties are still adjusting and responding to electronic data for use in relation to electronic court filing systems.

[17] The plaintiff did so accordingly vide supplementary affidavit of Eugene Blinov affirmed on 9 November 2011. When these proceedings then resumed for consideration, the preliminary concerns of the defendant were no longer in issue. Learned counsel did not press on this having agreed, quite rightly to focus on the real and substantial issue of his client's concerns founded under s 39 of the Act 646.

OBJECTIONS TO THE RECOGNITION/ENFORCEMENT OF AWARD

[18] The defendant raised objections to the recognition and enforcement of the award under subparas 39(1)(a)(ii), (iv) and (v) of the Act 646. But for these objections, the recognition and enforcement of the award would be almost 'mechanistic' or 'formalistic' in exercise once the conditions in s 38 of the Act

646 were fulfilled as was the approach taken in several decisions from the courts across the causeway; namely in the decisions of Prakash J in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR 174; Belinda Ang J in *Denmark Skibstekniske Konsulenter A/S Likvidation n (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661; and Choo Han Teck J in *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727; [2010] SGHC 304. I agree entirely that but for any objections under s 39, the plaintiff's whole exercise would be almost formalistic as has been the case in other similar applications before the court where the defendant does not even attend court to raise any objections under that section. This approach is necessarily so given the clear requirements of s 38 which merely call for the production of the requisite documents of contract and the arbitral award in the stipulated form. Under s 38, the plaintiff is not required to argue its case for recognition and enforcement. This approach is also consistent with the model UNCITRAL law on arbitrations and the New York convention for the recognition and enforcement of arbitral awards. Once the conditions have been satisfied, the award 'shall be recognized as binding and be enforced by entry as a judgment in terms of the award or by action'.

[19] Since it was the defendant who was contending that no recognition or enforcement ought to be allowed in the facts of this case, I next directed the defendant to make its submissions first. This is a summary of the parties' submissions.

THE DEFENDANT'S SUBMISSIONS

[20] Mr Arun Krishnalingam, learned counsel for the defendant submitted that the recognition or enforcement of the award is challenged under subparas 39(1)(a)(ii), (iv) and (v) of the Act 646. Put in a nutshell, his argument is that the dispute between the parties concerned the question of whether there was an agreement to grant rebate to the plaintiff buyer by the defendant seller. The Arbitral Tribunal decided that there was and the award was rendered. However, learned counsel argued that there is in fact no relevant agreement to arbitrate between the parties here. The reduction of the freight rebate was said to be subject to the signing of a memorandum of understanding. Since the draft MOU had no arbitration clause, there was no agreement to arbitrate on this dispute concerning the freight rebate. Under such circumstances, the award cannot be recognised or enforced.

[21] Mr Krishnalingam also submitted that the failure to raise this objection at the arbitration proceedings is irrelevant and that the principle of estoppel has no application here. His arguments rely substantially on the decision of the Supreme Court in the United Kingdom of *Dallah Real Estate and Tourism Co v*

Ministry of Religious Affairs, Government of Pakistan [2010] 3 WLR 1472. He further submitted that s 39 requires 'proof' of the lack of jurisdiction on the part of the Arbitral Tribunal. The present exercise is not a review of the arbitral process or how the Arbitral Tribunal arrived at the award. The court site afresh with evidence led to prove this absence of jurisdiction.

[22] For this, the defendant has offered evidence whereas the plaintiff has not. The defendant's evidence therefore should be accepted — *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; [1988] 2 CLJ 82; in which case, the application ought to be refused. Alternatively, learned counsel suggested that the court has the power to direct evidence to be brought for that determination; that is to determine if the contentions have been proved on a balance of probabilities.

THE PLAINTIFF'S RESPONSES

[23] Miss Hor primarily engaged the principle of estoppel in her submissions. In summary, she argued that the defendant was estopped from raising any objection as to the tribunal's jurisdiction since it had never challenged the tribunal's jurisdiction at its inception but had instead participated in the arbitration proceedings. This was apparent from para 1.2 of the award. Since the defendant had subjected itself to the tribunal's jurisdiction to determine the dispute; and had further made no submissions on this issue before the tribunal, this issue is no longer available to the defendant. In her words, the defendant 'has now lost the right to object'.

[24] In response to the argument that there was no agreement to arbitrate on the dispute concerning the freight rebate, or a lack of an arbitration clause in the MOU, Miss Hor submitted that this was irrelevant. This was because the dispute had been referred to arbitration under the said contract and not under the MOU or any unsigned future contracts. In which case, whether or not the MOU contained a clause requiring resolution by arbitration was said to be irrelevant.

[25] Further, the tribunal had already made a finding of fact in respect of the MOU and the other unsigned future contracts when considering the merits of the dispute. The current efforts of the defendant are said to be attempts to revisit issues already disposed by the tribunal which have been much frowned upon by the Court of Appeal. The plaintiff relied on *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49; [2003] 1 CLJ 103; *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788 and a few other High Court decisions as supporting this contention.

[26] Miss Hor then went on to submit that the award was made under the

Federation of Oils, Seeds and Fats Associations Ltd or FOFSA Rules of Arbitration and Appeal. By virtue of the arbitration clause found in cl 6 of the said contract, the juridical seat of the arbitration was in England and English law applies to this English award. That being the case, s 31 of the English Arbitration Act of 1996 applies. Under s 31, a party who wishes to challenge the jurisdiction of the Arbitral Tribunal must do so within the time frame prescribed. The failure to raise any objection or challenge the jurisdiction of the Arbitral Tribunal is said to thereby lose that right of challenge later before the tribunal or court. This is provided under s 73 of the English Arbitration Act of 1996 ('the 1996 Act').

[27] The plaintiff therefore argued that there were no merits to the jurisdictional issue raised by the defendant.

THE AWARD

[28] I propose to set out the relevant parts of award of Arbitration No 4170 in *extenso* seeing that the critical issue here concerns the jurisdiction of the tribunal:

1.0 INTRODUCTION

1.1 This is a dispute concerning the agreement or otherwise between the parties for a freight rebate to be paid by sellers to buyers. Buyers' position is that an agreement for such a rebate against this particular contract was agreed. Sellers dispute that any such agreement was reached.

1.2 Whilst the parties are divided on the above issues, neither party has questioned the jurisdiction of the arbitration, nor the fact that the present proceedings are subject to the FOSFA Rules of Arbitration and Appeal. By virtue of the arbitration clause the juridical seat of this arbitration is England and English law applies and this award is an English award.

1.3 …

1.4 …

2.0 THE CONTRACT

3.0 THE FACTS

4.0 BUYERS' SUBMISSIONS

5.0 SELLERS' SUBMISSIONS

6.0 DISCUSSIONS AND FINDINGS

6.1 The umpire having carefully considered the submissions made and evidence provided does hereby find and award as follows.

6.2 As per 6.1, I have read all the submissions and documents submitted by both sides. The issue to be determined is whether, during a meeting in

Istanbul, an agreement had been made that called for sellers to refund to buyers US$30 per metric ton die to a reduction in the previously allocated freight cost for the shipment performed by the MT Miss Marilena.

6.3 Buyers' position is that this was the agreement and that this is borne out by the text of their email to sellers dated 21 April 2009. Sellers in defence of this stated that the agreement reached was to be formalised by the signing of an MOU but that although a draft MOU was issued it was never signed. The terms of this draft MOU were to be that a rebate was agreed subject to future business and sellers submitted that it would have made no sense for them to agree any discount to the originally quoted freight costs unless it was based and reliant upon future business — future business that sellers submit did not materialise.

6.4 Looking closely at the email of 21 April 2009 there are a couple of points that immediately become apparent, namely that buyers specifically refer to the shipment under the contract subject to this dispute and that the overpayment, as it is termed in the email, is for an amount of US$30 per metric ton. Sellers' defence to what is essentially buyers' case, is that the draft MOU that was issued just after the Istanbul meeting, on 13 April 2009 but never signed, made specific reference not to the MT Miss Marilena, but to the MT ORINOCO STAR and 'the next vessel after that'. It was submitted and not contested that the MT ORINOCO STAR was the performing vessel after the MT Miss Marilena. It is further noted that the draft MOU makes reference to a freight premium of US$67 per metric ton and not US$70 per metric ton as mentioned in the previously mentioned email.

6.5 The next point of relevance would appear to the umpire to be that in response to that 21 April 2009 email. Sellers sent a mail that made specific reference not to the MT Miss Marilena and the US$30 rebate that had been requested by Buyers, but to the price revision for the MT ORINOCO STAR. In that mail, Sellers advised that the price change on the MT ORINOCO STAR could only take place for the June arrival vessels. There was no mention in that reply to the consignment shipped on the MT Miss Marilena or the US$30 rebate. For completeness I note and record that the evidence submitted was that the MT Miss Marilena arrived and transshipped her cargo onto the MT CHINGIZ MUSTAFYEV in April 2009.

6.6 Having carefully considered the above, along with the other evidence submitted by the parties I am more inclined to accept the position as portrayed by buyers in this matter. It is always difficult to reach a decision in cases where the parties disagree over what was essentially a verbal agreement however my position in this case is taken from what I can see to have been the expectations of the parties in April 2009.

6.7 The evidence suggests that the parties agreed to the US$30 discount on the freight costs on the MT Miss Marilena, and that later adjustments, down to US$67 per metric ton from US$100 per metric ton, were to be subject to terms set down in an MOU. I was, for the record, almost

swayed by the fact that it could be said to be illogical to formalise some of the agreement but not at all. I also took into account the wording of cl 7 of the contract, however, the text of the referenced emails and the different reductions mentioned convinced me otherwise.

6.8 Given the above explanations I therefore find that the parties agreed that buyers would receive a US$30 per metric ton freight discount on the consignment carried on the MT Miss Marilena and that sellers have failed to make good that agreement.

6.9 As to costs, buyers have also claimed compound interests and costs of the arbitration. I would say that I can see no reason why I should depart from the usual practice that costs follow the award or indeed as to why buyers should not be awarded interests, having claimed for it.

6.10 Both parties have used outside counsel in this matter and both parties also claimed costs and I therefore conclude that both sides consider such costs to be recoverable under the arbitration. Given my approach in this case I can see no reason to waiver from the usual rule that legal costs should follow the award.

7.0 AWARD

7.1 I hereby award that sellers shall pay to buyers the sum of US$180,768.42 (…) basis the following calculations:

RBD Palm Oil Olein — US$30 x 4,975,614 metric tons = US$149,268.42

RBD Palm Kernel Oil — US$30 x 1,050 metric tons = US$31,500.

7.2 I further award that sellers to pay buyers interest on the awarded amount at 7.1 above calculated at 4% (Four per cent) per annum compounded at quarterly rests from 23 April 2009 till the date the funds are received by buyers.

7.3 I further award that the fees, costs and expense of the award amounting to £7,550 (Seven Thousand Five Hundred and Fifty pounds sterling) shall be for the seller's account. If Buyers have paid any or all such costs in the first instance, they shall be entitled to immediate reimbursement.

[29] In respect of Award of Arbitration No 4171 which is in relation to *D24NCC(ARB)-37 of 2010/2011*, after making similar findings, the umpire, inter alia, ordered:

(i) that the defendant to pay the plaintiff the sum of USD256.271.40 ('Debt');

(ii) that the defendant to pay the plaintiff interest on the debt at the rate of 4%pa compounded at quarterly rests from 23 April 2009 to the date of full payment; and

(iii) that the fees, costs and expense of the award amounting to £7,550 shall be for the defendant's account. If then plaintiff has paid any or all such costs in the first

instance, the plaintiff shall be entitled to immediate reimbursement. In this respect, the sum is £5,050 being the fees, costs and expenses of the award that the plaintiff has already paid.

[30] From the contents of the award, the issue before the tribunal was obviously about whether the parties had reached an agreement on a freight rebate at that critical meeting in Istanbul on 10 April 2009. The issue before this court however, is not about that at all. It is entirely different. It is about whether the defendant's strong objections on according recognition and enforcement of the award that emanated from a tribunal which purportedly lacked the necessary jurisdiction to hear and determine the dispute, can be sustained. The defendant has invoked subparas 39(1)(a)(ii), (iv) and (v) which in essence amounts to contending that the tribunal lacked jurisdiction to arbitrate in the dispute in the first place. If the defendant is successful in its contentions, the award may be refused recognition.

[31] Let me begin by saying that from the arguments posited by both parties, it is safe and reasonable to conclude that both parties agree that subparas 39(1)(a)(ii), (iv) and (v) concern the matter of the tribunal's jurisdiction. Further, it may also be said that the parties agree that the lack of that jurisdiction is one of the grounds upon which recognition or enforcement of an award may be refused. Of course, it is clear from its counsel's arguments that the plaintiff is urging the court to reject the defendant's invocation of those grounds for the reasons that it has proffered while the defendant argued otherwise.

[32] Having examined subparas 39(1)(a)(ii), (iv) and (v), I agree that these provisions do indeed deal with matters concerning the jurisdiction of the tribunal. The approach thus taken by counsel is both sensible and correct.

SECTION 39 OF THE ARBITRATION ACT 2005 (ACT 646)

[33] Moving then to the substantive issue of the defendant's objections. Having examined s 39 and the related provisions of Act 646 very carefully, and having considered the comprehensive written and oral submissions of both learned counsel who had referred to the relevant affidavits and exhibits filed, it is further my judgment that the issue of jurisdiction of the Arbitral Tribunal to arbitrate on the dispute referred by the parties is still open for examination and determination by the court today sitting as the enforcing court despite the reasons proffered by the plaintiff. And, it is also my judgment that the Arbitral Tribunal lacked the necessary jurisdiction to arbitrate in the pertinent dispute in the first place. That being so, the award rendered by the Arbitral Tribunal will not be granted the recognition and enforcement sought. I say so for several reasons.

[34] The starting point lies in s 39. This section was amended in July 2011. These are the provisions of s 39 prior to the amendments:

39 Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it was invoked —

(a) where that party provides to the High Court proof that —

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (2) the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement was not in accordance with this Act; or

(vii) the award had not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

ARBITRATION (AMENDMENT) ACT 2011 (ACT A1395 OF 2011)

[35] Section 39 was amended vide Arbitration (Amendment) Act 2011 (Act A1395 of 2011) which came into force on 1 July 2011. For our present purposes, Act 1395 of 2011 amended subpara 39(1)(a)(ii) which now reads as follows:

(1) Recognition or enforcement of an award, irrespective of the State in which it was

made, may be refused only at the request of the party against whom it was invoked —

(a) where that party provides to the High Court proof that —

(i) …;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, *under the laws of the State where the award was made;* (Emphasis added)

[36] Subparagraph 39(1)(a)(v) was also amended to now read as 'subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration'. Sub-s (3) provides:

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[37] The defendant had taken issue with the applicable subpara 39(1)(a)(ii). It contended that this court should apply the provision prior to its amendment in which case the court should determine the issue of validity of the arbitration agreement under the 'laws of Malaysia'. On the other hand, the plaintiff argued that this court should apply the provision as amended, that is, to determine the issue under 'the meaning of the law of the country where the award was made'.

[38] On this point of applicable law, although I agree with the plaintiff, it is for different reasons. The plaintiff had relied on sub-s 51(3) of the Act 646 in answer to this poser. In my view, the answer actually can be found in the new sub-s 51(4) which was introduced by the same amending Act A1395 of 2011. Sometimes, as was the case here, the amending legislation includes savings and transitional provisions dealing with the status of pending arbitrations or related court proceedings. Sub-s 51(4) which was introduced by s 10 of Act A1395 is just such a provision. Sub-s 51(3) together with the whole of Act 646 was brought into force on 15 March 2006 (vide PU (B) 65/2006). It reads:

(3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[39] This subsection clearly provides for the position of any pending proceedings relating to arbitration which have already been filed in court before Act 646 came into force. Such proceedings are 'saved' or preserved and remain unaffected. In other words, the old law, that is Arbitration Act 1952, would apply. The use of the words 'this Act' refers to Act 646. These words cannot be used to refer to the Amending Act A1395 of 2011 which is what learned counsel tried to do in interpreting the new subsection.

[40] The new sub-s 51(4) was specifically enacted to provide for court proceedings filed after the commencement of Act 646 regardless that those proceedings 'arose out of arbitral proceedings commenced before the commencement of this Act'. This is the new sub-s 51(4) as introduced by Act A1395 of 2011:

> (4) Any court proceedings relating to arbitration commenced after the commencement of this Act shall be governed by this Act notwithstanding that such proceedings arose out of arbitral proceedings commenced before the commencement of this Act.

[41] Since the present proceedings obviously concerned and arose out of the arbitral proceedings which not only commenced but were completed in 2009, well before this amending Act came into force, it is the new sub-s 51(4) which will apply. The general rule of interpretation of prospective application of legislation, including any amending legislation suggested by learned counsel for the defendant, does not apply in view of this specifically enacted provision. That being the position, s 39, as amended by Act A1395 of 2011 and which came into force on 1 July 2011, now applies to the present proceedings filed on 2 August 2011.

THE DECISION IN DALLAH REAL ESTATE AND TOURISM CO V MINISTRY OF RELIGIOUS AFFAIRS OF THE GOVERNMENT OF PAKISTAN [2010] 3 WLR 1472

[42] The unanimous decision of the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs, Government of Pakistan* offers much guidance in its insightful observations and considerations where the issue arose as to whether the matter of jurisdiction may be raised at the late stage of recognition and enforcement. The Supreme Court answered this same issue in the positive. After examining the evidence, the Supreme Court went on to hold that the tribunal lacked jurisdiction to determine the dispute because there was no requisite agreement to do so between the parties. The decision is of particular interest also because the Supreme Court had to consider the matter under s 103 of the English Arbitration Act of 1996, which provision is substantially similar to s 39 of Act 646. I propose to examine this decision in some detail. To do that, the background facts must first be appreciated. These were the facts.

[43] *Dallah Real Estate and Tourism Co* ('Dallah'), a Saudi company is a member of a group providing service for the Holy Places in Saudi Arabia. In February 1995, Dallah proposed to the Government of Pakistan to provide housing for pilgrims on a 55-year lease with associated financing. The Government approved the proposal in principle and a Memorandum of

Understanding was concluded. The total costs for the land and related construction was initially set at US$242m with the Government taking a 99 year-lease subject to Dallah arranging the necessary financing. Dallah subsequently acquired a larger and more expensive piece of land. It also did not keep to the timetable scheduled. The Government then promulgated Ordinance No VII effective from 14 February 1996. Under article 89(2) of the Ordinance, it was provided that the ordinance 'shall stand repealed at the expiration of four months from its promulgation' or if the ordinance had been laid before Parliament, would then take effect as a bill. This ordinance established a trust to maintain a fund with a trustee bank. This trust was to be financed from, inter alia, contributions and savings by pilgrims and philanthropists. This trust would lease the housing constructed by Dallah. As it turned out, the ordinance was not laid in Parliament. Instead, further ordinances were promulgated to recreate and continue the trust.

[44] With the increased costs involved, Dallah entered into further negotiations with the Government which led to the signing, inter alia, of an agreement between the parties on 10 September 1996. That agreement contained an arbitration clause which read:

> Any dispute or difference of any kind whatsoever between the trust and Dallah arising out of an or In connection with this agreement shall be settled by arbitration held under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, by three arbitrators appointed under such Rules.

[45] On 6 November 1996, there was a change of government. Under the new Government, no further ordinance was promulgated and the trust accordingly ceased to exist as a legal entity. Without the trust, the funding for the construction was obviously affected negatively. Dallah then invoked the arbitration clause against the Government, nominating Lord Mustill as its arbitrator. The ICC appointed justice Dr Nassim Hasan Shah as the Government's arbitrator and Dr Ghaleb Mahamassani as chair. Throughout the arbitral proceedings, the Government maintained a jurisdictional reservation and did not do anything to submit to the jurisdiction of the tribunal or waive its sovereign immunity.

[46] The ICC Arbitral Tribunal sitting in Paris issued two partial awards before issuing a final award on 23 June 2006. Dallah approached the English courts for enforcement of the final award. On 9 October 2006, it was granted leave by Clarke J to enforce the final award made in its favour. The Government applied to have the order set aside. After a three day hearing where oral evidence was led, Aiken J allowed the application on 1 August 2008. That decision was affirmed by the Court of Appeal on 20 July 2009. Dallah appealed to the Supreme Court.

[47] On 19 August 2009, Dallah applied before the French courts for enforcement of the final award. It then sought a stay of the appeal pending the outcome of its application. On 25 January 2010, the Supreme Court refused the application. Meanwhile, the Government applied in France to set aside all three awards.

[48] At the hearing of the substantive appeal, the principal question before the Supreme Court was the jurisdiction of the Arbitral Tribunal. Since the arbitration clause as found in the agreement of 10 September 1996 was invoked to confer this jurisdiction, the validity of this arbitration agreement had then to be determined. Writing the main judgment, Lord Mance at p 1478 considered that issue of the validity of the arbitration agreement depended upon 'whether there existed between Dallah and the Government any relevant agreement at all …' His Lordship further opined that the 'issue regarding the existence of any relevant arbitration agreement falls to determined by the Supreme Court as a United Kingdom court under the provisions of the national law which are contained in the Arbitration Act 1996 and reflect article V(l)(a) of the New York Convention'.

[49] The 'national law' that Lord Mance referred to was the 1996 Act, specifically s 103(2)(b). As mentioned earlier, this provision is similar to subpara 39(1)(a)(ii) of Act 646 which is currently under examination. Section 103(2)(b) reads as follow:

> 103
>
> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves —
>
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some Incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

[50] It was the view of the Supreme Court that s 103(2)(b) of the 1996 Act required the consideration of the following:

(a) the meaning of the 'law of the country where the award was made';

(b) the provisions of that law as regards the existence and validity of an arbitration agreement;

(c) the nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such a law; and

(d) what is the relevance of the fact that the Arbitral Tribunal has itself ruled on the issue of its own jurisdiction.

[51] I believe it more appropriate to first see how the Supreme Court dealt with the third and fourth considerations which are in fact interlinked. Counsel for Dallah submitted that the enforcing court should adopt an approach of 'no more than a 'review' of the tribunal's jurisdiction and the precedent question whether there was ever any arbitration agreement binding on the Government, and even then it should be a 'limited review'. This was because the tribunal had power to consider and rule on its own jurisdiction and an enforcing court 'should refuse to become further involved, at least where the tribunal's conclusions could be regarded on their face as plausible or 'reasonably supportable'.

[52] Disagreeing strongly with this submission, Lord Mance found that a tribunal's decision on the existence of its own jurisdiction to arbitrate did not bind the party who had not submitted the question of arbitrability to the tribunal. More importantly, His Lordship held that the tribunal's decision was always open to 'a full judicial determination on evidence of an issue of jurisdiction' by the court — see p 1485. Significantly, His Lordship concluded that there are no restrictions 'on the nature of the exercise open either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do article VI and s 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made'.

[53] Lord Mance further opined that where the 'very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal's activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought …' His Lordship was of the view that this position was regardless of whether:

> … an Arbitral Tribunal has either assumed or, after full deliberation concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its own jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so with whatever the composition of the tribunal — a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's

'eminence', 'high standing and great experience'. The scheme of the New York Convention, reflected in ss 101–103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of providing one of the matters set out in Article V(1) and s 103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start 15 or 30 love up.

31 This is not to say that a court seised of an issue under Article V(1)(a) and s 103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an Arbitral Tribunal which has undertaken a similar examination. Courts welcome useful assistance.

[54] The judgment of Lord Collins of Mapesbury JSC too is insightful on how the determination of the tribunal on this same issue is to be regarded by the enforcing court. At p 1504, His Lordship succinctly enunciated the principle that the tribunal does not have 'exclusive power to determine its own jurisdiction', nor does it mean that the tribunal's determination cannot be re-examined:

So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.

[55] In fact, Lord Collins regarded the 'last word as to whether or not an alleged Arbitral Tribunal actually has jurisdiction will lie with a court, either in a challenge brought before the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad. The degree of scrutiny, particularly as regards the factual inquiry, will depend on national law, subject to applicable international conventions'. At pp 1508–1509, His Lordship pointed out that this approach of re-examination had been consistently adopted by the English courts with the consequence that '… in an international commercial arbitration, a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue

estoppel or other preclusive effect in the court in which enforcement is sought: see, eg *Svenska Petroleum Exploration Bank of Allahabad v Government of the Republic of Lithuania and another (No 2)* [2007] QB 886, para 104 and *Paklito Investment Ltd v Klockner East Asia Ltd and another* [1993] 2 HKLR 39, 48, per Kaplan J.

[56] Both Lord Hope of Craighead and Lord Saville of Newdigate JSC shared similar reservations and concerns, though in stronger and unequivocal terms. At p 1523, Lord Hope held that this question of whether a tribunal had jurisdiction to make the award was one which 'goes to the root' and as such 'it must be for the court to determine. It cannot be left to the determination of the arbitrators'. Lord Saville took the view that '… the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself' — see p 1524.

[57] The law Lords also examine the practice in England and found that the consistent practice of the courts in England has been that they will always examine or re-examine for themselves the jurisdiction of arbitrators. Such examinations have been carried out in a variety of contexts, including a challenge to the tribunal's jurisdiction under s 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. See for example *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476 and *Eagle Growth, Peterson Farms Inc v C & M Farming Ltd* [2004] 1 Lloyd's Rep 603. It was the Supreme Court's view that this approach was 'plainly right'.

[58] From these deliberations, it can be seen that the Supreme Court was emphatic that the Arbitral Tribunal had neither the first nor the last word on the determination of the issue of the validity of the supposed arbitration agreement. It lies with the court. Thus, in determining whether a supposed arbitration agreement exists and is valid under the laws of the country where an arbitral award was made, the enforcing or recognising court needs to bear in mind the following principles:

(a) that the enforcing court must carry out an independent exercise or investigation into the issue;

(b) that this exercise or investigation is not by way of review of the tribunal's decision but is an ordinary judicial determination on the factual evidence and law;

(c) that the tribunal does not have exclusive power to determine the issue;

(d) furthermore, regardless of its composition, eminence, high standing or great experience, the tribunal's own view of its own jurisdiction has no legal or evidential value;

(e) that the enforcing court is entitled, if not bound to re-examine any decision that the tribunal may already have rendered on the issue;

(f) that the degree of scrutiny on the issue will depend on the national law of the country where the enforcement is sought, subject to international conventions; and

(g) that the onus of proving this lack of jurisdiction is on the person resisting recognition or enforcement.

[59] I find that these principles are in tandem with the intention and operation of s 39, regardless of the amendments in 2011. Unlike the operation of s 38 which, as pointed out earlier, is more formaiistic in nature, the court under para 39(1)(a), has a discretion when it comes to refusing and by the same token, allowing recognition or enforcement of awards. This is evident in the deployment of the word 'may' here as opposed to 'shall' found in s 38 when dealing with requests of refusing recognition or enforcement of an arbitral award. This usage and the conferment of discretion in such circumstances cannot be real and meaningful unless the court was intended to perform more than a perfunctory role in such matters.

[60] I am fortified in my view when the conditions for refusing recognition or enforcement are examined. Under para 39(1)(a), the court is to be provided with 'proof' while under para 39(1)(b), the court is expected to make a finding on whether any of the grounds relied on for refusing recognition or enforcement were rightly invoked. The choice of these words is deliberate by Parliament. Such powers and exercises are futile if the arguments on the Arbitral Tribunal's jurisdiction are closed to examination by this court.

[61] As the recognising or enforcing court, this court is not sitting in review of the award or even of the Arbitral Tribunal proceedings. In fact, to suggest that this court is not entitled to hear arguments and evidence on any of the grounds relied on would be to run counter to the very provisions of s 39 as identified earlier. How else is the court to exercise its discretion on whether a burden of proof is satisfied or a finding can be made if arguments and, more importantly, evidence cannot be led before the court for its consideration.

[62] Indeed, this court has the power to examine the issue of the Arbitral Tribunal's jurisdiction regardless of whether the issue is raised for the first time today or, it has been raised previously before and it was already considered by the Arbitral Tribunal. That being the case, it is immaterial that the parties, especially the defendant did not raise or object to the Arbitral Tribunal's jurisdiction at the relevant time of the arbitral proceedings. I will elaborate on this shortly as the plaintiff has taken umbrage on this under ss 31 and 73 of the English Arbitration Act of 1996. In my view, even if the issue of jurisdiction had been taken before the Arbitral Tribunal and the Arbitral Tribunal had rejected it after due consideration, this court is not prohibited from re-examining that issue all over again.

[63] As the recognising or enforcing court, this court is entitled, if not bound, to inquire fully into the matter of jurisdiction or lack of jurisdiction of the Arbitral Tribunal in making its award. This determination of a matter as important as that of jurisdiction of the Arbitral Tribunal is not and cannot, with respect, regardless of its composition, be left to the Arbitral Tribunal. Instead, this court must itself conduct an independent investigation as to whether the defendant who is resisting enforcement has proven that there is in fact no agreement to arbitrate.

[64] The burden of proving any of the grounds in subparas 39(1)(a)(i)–(vii) rests with the party resisting that recognition or enforcement. In other words, the burden of proof lies with the defendant. Such a burden must be satisfied on a balance of probabilities given the nature of the current proceedings. The defendant must therefore lead evidence to prove to the satisfaction of this court that the Arbitral Tribunal lacked the requisite jurisdiction.

[65] This approach finds support and is consistent with that adopted by those countries that have applied the UNCITRAL Model Law on Commercial Arbitration. Since Act 646 takes much of its structure and principles from the model law, the decisions of jurisdictions which have similarly adopted such stance is therefore of persuasive value. The approach which I have just enunciated was in fact adopted in *China Minmetals Minerals Import and Export Co Ltd v Chi Mei Corp* (2003) 334 F 3d 274, a decision of the United States Court of Appeals (Third Circuit) which was cited with approval in *Dallah Real Estate and Tourism Co*. In *China Minmetals*, it was decided that the enforcing court must make an independent determination of the question as to whether there was an arbitration agreement between the parties. If there was none, the award then cannot be enforced. *Dallah Real Estate* was also applied with approval by the Singapore High Court in the decision of *Denmark Skibsteknikniske Konsulenter A/S Likvldation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)*.

THE VALIDITY OF THE ARBITRATION AGREEMENT

[66] In the present case, this court is not plagued by concerns of an earlier determination of the issue of jurisdiction by the tribunal that arose in *Dallah Real Estate* and how to treat such a determination, whether as a review or afresh. From the contents of the award, it is apparent that the Arbitral Tribunal was never concerned with the issue as to its jurisdiction and neither were the parties. In fact, the Arbitral Tribunal itself had observed at para 1.2 of its award that:

> Whilst the parties are divided on the above issues, neither party has questioned the jurisdiction of the arbitration, nor the feet that the present proceedings are subject to the FOSFA Rules of Arbitration and Appeal. By virtue of the Arbitration Clause the juridical seat of this arbitration is England and English law applies and this award is an English Award.

[67] There was, therefore, no deliberation of the issue of jurisdiction. The Arbitral Tribunal simply assumed jurisdiction under cl 6 of the said contract and pronounced the application of English law. The plaintiff similarly argued that the award was made under the Federation of Oils, Seeds and Fats Associations Ltd or FOFSA Rules of Arbitration and Appeal. Therefore, by virtue of the arbitration clause found in cl 6 of the said contract, the juridical seat of the arbitration was in England and English law applies to this English award. In my view, as mentioned at the start of my findings, even if there were any determination of its jurisdiction by the Arbitral Tribunal, this court is not impeded in re-examining the issue afresh, examining any evidence now led and weighing the same against the relevant law.

[68] Having resolved the question as to how the court is to approach the determination of the Arbitral Tribunal's jurisdiction, the next task would be to make that determination. For that, it is necessary to know what the law is on the validity of the arbitration agreement. In *Dallah Real Estate*, this was actually the first concerns of the Supreme Court. The court had to establish the meaning of the law of the country where the award was made; and the provisions of that law as regards the existence and validity of an arbitration agreement.

[69] The Supreme Court had no problem establishing 'the law of the country where the award was made' as it was common ground that since the award was made in France, French law was relevant. The Supreme Court however decided that because the award arose from an international arbitration, the French law that would be applied would not be that applied to a purely domestic arbitration. Rather, as agreed by the experts on French law appointed by both parties through their joint memorandum before Aiken J,

'Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration … can be determined according to rules of transnational law'.

[70] As for what the provisions of French law as regards the existence and validity of the arbitration agreement, the Supreme Court again relied on the experts' joint memorandum. According to the experts, under French supra-national or transnational law, a French court would apply 'a test of common intention to an issue of jurisdiction'. The existence of that intention was determined by reference to the facts of the case that would include the 'behavior of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement', good faith and the subjective intentions of the parties. The Supreme Court agreed with that view adding in its opinion that it 'is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied' — see p 1482.

[71] In the present case, national law as found in subpara 39(1)(a)(ii) of the Act 646 contains a similar test of validity by reference to 'the laws of the State where the award was made'. However, at first blush, it is not all that clear that English law applies as 'the laws of the State where the award was made. Leaving aside cl 6 of the said contract for a moment, there is actually no evidence before me as to 'where the award was made'. This phrase indicates a physical or geographical reference as opposed to a notional place. It may seem so obvious to the parties that it needed no stating where that place is but, being aware that an award may just easily be made in Country A but applying laws of Country B with a juridical seat in Country C; I do not believe the circumstances of this case allows the court to assume. Subparagraph 39(1)(a)(ii) in fact allows the enforcing court to apply the laws of Country A as opposed to any of the parties' choice of law.

[72] Be that as it may, from my perusal of the award, it states that it is a FOFSA International Award of Arbitration No 4170; FOFSA being the acronym for 'Federation of Oils, Seeds and Fats Associations Ltd'. An address in London is provided. On the last page of the award, again, there is no indication as to 'where the award was made'. On that score alone, the application of subpara 39(1)(a)(ii) as suggested by the plaintiff is actually impeded. I had sought clarifications and both counsel have advised the court that the awards were indeed made in London and that the court be entitled to make that assumption.

[73] Once again, while I agree with the application of English law here, it is not for the reasons submitted by the plaintiff. With respect, the application of

English law is simply because of the operation of national law as found in subpara 39(1)(a)(ii). Being reminded of the parties' explanation that the award was indeed made in London, England, the country where the award was made; it is English laws that will be applied. But, not because of cl 6 of the said contract.

[74] In any case, it is inappropriate to rely on cl 6 for this purpose as it is housed in the very contract which is under challenge. In this regard, I agree with the contentions of the defendant that where the challenge is in respect of the contract itself or the purported arbitration agreement itself, the law of the contract cannot be used to decide the point. This was the approach taken in *Dallah Real Estate* and also in *Heyman and another v Darwins, Ltd* [1942] AC 356. Viscount Simon LC writing for the House of Lords observed at p 366:

> My Lords, it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as this, and I trust that the decision of the House in this appeal may be useful for this purpose and I will remove any misunderstanding which may have grown up out of certain phrases in some of the previous decisions to which I have referred. At the risk of some repetition, I would summarise what I conceive to be the correct view on the matter as follows. An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. *If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void.* (Emphasis added.)

[75] Neither can the plaintiff look to the agreement purportedly reached in Istanbul for the very issue before the Arbitral Tribunal was whether that agreement existed at all. I shall return to this later.

[76] Insofar as English law is concerned, the plaintiff submitted that under s 31 of the 1996 Act, a party who wishes to challenge the jurisdiction of the Arbitral Tribunal must do so within the time frame prescribed. The failure to raise any objection or challenge the jurisdiction of the Arbitral Tribunal is said to deprive the party that right of challenge later before the tribunal or court under s 73 of the 1996 Act. In essence, ss 31 and 73 are relied on by learned counsel to deny the defendant the right to revisit this issue of validity of the arbitration agreement. In other words, the principle of estoppel operates to deprive the defendant who ought to have challenged the Arbitral Tribunal's jurisdiction in the 'courts of the arbitral seat', that is in England.

[77] In my view, with respect, this argument is somewhat fallacious.

[78] First, when applying English law, the plaintiff has only addressed this challenge under ss 31 and 73 of the 1996 Act. These are the relevant provisions of ss 31 and 73 of the 1996 Act:

31 Objection to substantive jurisdiction of tribunal

(1) An objection that the Arbitral Tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) An objection during the course of the arbitral proceedings that the Arbitral Tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The Arbitral Tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may —

(a) rule on the matter in an award as to its jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

73 Loss of right to object

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthright or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection —

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with …

(d) that there has been...

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the Arbitral Tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling —

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

[79] The effect of s 73 of the 1996 Act was succinctly explained by Mr Justice Moore-Bick in *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14, 19 to mean:

… that a party to an arbitration must act promptly if he considered that there were grounds on which he could challenge the effectiveness of the proceedings; if he failed to do so and continued to take part in the proceedings he would be precluded from making a challenge at a later date. Moreover, it is clear from the language of sub-s (1) itself that it is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award. If the respondent can show that the applicant took part or continued to take part in the proceedings without objection after the grounds of objection had arisen, the burden passes to the applicant to show that he did not know, and could not have with reasonable diligence have discovered, those grounds at the time. It may often be necessary, therefore, to consider the applicant's conduct of the proceedings against the background of his developing state of knowledge.

[80] His Lordship went on to explain what the expression 'continues to take part in proceedings mean; that the expression:

… is broadly worded and the sub-s as a whole is designed to ensure that a party who believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises that objection, if he wishes to do so, as soon as he is, or ought to reasonably to be, aware of it. He is not entitled to allow the proceedings to continue without alerting the tribunal and the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid. There is, however, a more fundamental objection of principle to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he is dissatisfied with the outcome. The unfairness inherent in doing so is, of course, magnified if the defect is one which could have been remedied if a proper objection had been made at the time. Once arbitration proceedings have been commenced there may well be many periods during which no formal step is required of one or other party, but it would be right as a matter of ordinary usage to say that during such periods either party is not taking part in the proceedings … I can see no reason why a party who discovers grounds of objection after the conclusion of the hearing and before the publication

of the award should not be required to voice it promptly, even at that stage, if he wishes to pursue it later on by challenge to the award. To require him to do so is consistent both with the wording of s 73(1) and the principles that underlie it.

[81] While I appreciate the plaintiff's arguments as enunciated in *Rustal Trading Ltd v GUI & Duffus SA*, it must not be forgotten that the circumstances there were quite different from the instant case. The court in that case was asked to set aside an award under s 68 of the Arbitration Act of 1996 on the ground that there were serious irregularities. In such circumstances, s 73 is relevant. The courts' approach in applications to set aside awards is quite different from applications for recognition and enforcement of awards, the concern of the court here. In *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* and *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor*, the Court of Appeal held that the jurisdiction to set aside or to remit Arbitral Tribunals' awards was 'one that should be exercised with great care and with a proper sense of responsibility'. The Court of Appeal reminded that the Arbitral Tribunals are the sole judges on the findings of fact and that the court should not set aside an award even if the court itself would have come to a different decision. Proceedings to set aside awards are not appellate in nature and this would be contrary to the legislative intent as well as to settled practices in this respect.

[82] This issue also arose in *Dallah Real Estate.* In its written submissions, Dallah's counsel had also raised issue estoppel that having regard to the Government's deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards, the Government was now estopped from raising this issue at the stage of enforcement and recognition. Although this argument was abandoned during the oral submissions with the Government's recent application to set aside the award in France, Lord Mance in no uncertain terms said at p 1484:

> … But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.
>
> 24 Dallah's stance on question (d) cannot be accepted. Arbitration of the kind with which this appeal is concerned is consensual — the manifestation of parties' choice to submit present or future issues between them to arbitration. Arbitrators (like many decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular decision on such matters create or extend the authority to do this, they cannot by their decision on such matters create or extend authority conferred on them. Of course, it is possible for parties to agree to submit to arbitrators (as it is possible for them to

agree to submit to a court) the very question of arbitrability — that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such agreement is not simply rare, it involves specific agreement (indeed 'clear and unmistakable evidence' in the view of the United States Supreme Court in *First Options of Chicago Inc v Kaplan* (1995) 514 US 938, 944, per Breyer J) and, absent any agreement to submit the question of arbitrability itself to arbitration, 'the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently': at p 943.

[83] Lord Collins, too, was prepared to say that in some cases, if there had been a determination by the court of the seat on this very question, issue estoppel may arise — see p 1509.

[84] From the provisions of s 39, it is my considered view that the defendant who objects to the jurisdiction of the Arbitral Tribunal has two options which are not mutually exclusive. It may challenge the Arbitral Tribunal's jurisdiction in the courts of the arbitral seat (English courts); or it may, as it is now, resist enforcement before the enforcing court. Not having taken the first option does not deprive the defendant of its right to raise it for the first time nor should it be treated with any less regard. This is entirely proper and within the intention and scope of s 39. Otherwise, the rights and the options contained in s 39 would not be true and viable.

[85] This view is not peculiar to this jurisdiction. In *Galsworthy Ltd of the Republic of Liberia*, the Singapore High Court accepted the submissions of the parties on this same point. Choo Han Teck J agreed that the two courses of action are alternatives, and not cumulative and cited two previous decisions which had similarly adopted this approach — *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR (R) 1 and *Aloe Vera American v Asianic Food (S) Pte Ltd and another* (supra).

[86] In the other Singapore High Court decision of *Denmark Sklbstekniske Konsulenter A/S Likvidation v Ultrapolis 3000 Investments Ltd* which was referred to earlier, Belinda Ang J too had occasion to consider this matter of estoppel, whether Ultrapolis was estopped from challenging the enforceability of the award given that it did not challenge it in the supervisory courts of Denmark. Her Ladyship also referred to *Dallah Real Estate* which had 'considered whether a failure to seek curial relief in the supervisory court but established a good defence before the recognising court gave rise to an issue estoppel'. I note that Her Ladyship only had the benefit of the Court of Appeal's decision at the time of her decision. Nevertheless, Her Ladyship accepted that 'defendant's failure to pursue an appeal in France did not create an estoppel which precluded reliance on the defence in the English

enforcement proceedings' and that 'the failure to seek an annulment in the curial court did not in any way affect the independent and alternative right of the respondent to defend enforcement proceedings'. The court then went on to apply *Dallah Real Estate* holding that Ultrapolis was not estopped from challenging the enforcement of the award in question. But it could only succeed if it discharged the burden of establishing that there was no valid agreement under s 31(2)(b) of the International Arbitration Act (Cap 143A 2002 Rev Ed) of Singapore. This is the equivalent provision to s 103(2) of the English Arbitration Act of 1996 and, para 39(1)(a)(ii) of Act 646. In the judgment, Her Ladyship accepted the plaintiff's expert evidence that the arbitration clause and governing law clause formed part of the agreement in question. That being so, the court held that there was a valid arbitration agreement. Consequently, the defendant was held to have failed to discharge its burden and the award was granted recognition and enforcement.

[87] I also observe that despite the amendments made in 2011, the phrase 'irrespective of the State in which it was made' as found in sub-s 39(1) has been retained. The opening words in sub-s 39(1) states:

> Recognition or enforcement of an award, *irrespective of the State in which it was made*, may be refused only at the request of the party against whom it was invoked …. (Emphasis added.)

[88] To me, this shows that while only the party against whom recognition or enforcement is sought can object, the 'recognizing or enforcing Court' maintains at all times, a discretionary power on whether or not to grant that recognition or enforcement. This discretion is dependent on proof of the circumstances set out in subparas 39(1)(a)(i)–(vii); or where the court finds under subparas 39(1)(b)(i) and (ii) that the 'subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or the award is in conflict with the public policy of Malaysia'. This over-arching consideration which remains intact despite the amendments brought by the Amending Act indicates that the 'recognizing or enforcing Court' retains and has the final say on this critical matter of whether or not to recognise or enforce an award. This is consistent with the approach adopted in most jurisdictions that the exercise under s 39 is far from being formalistic or mechanical; and that the right to object is still available though not raised earlier.

[89] Further, it can be readily seen that these provisions of the law cited by the plaintiff is actually the *lex arbltri*, the law concerned with the arbitral proceedings, and not the *lex causae* or substantive proper law. These provisions of the law do not lay down principles determining the existence or validity of an arbitration agreement. For that, one must refer to the ordinary English law of contract as found, inter alia, under common law, and in the Sale of Goods Act

1979 and Companies Act 1985, which laws are, to a large extent, similar to the relevant laws here. To my mind, these principles of law on the formation of a valid contract apply to the formation of a valid arbitration agreement, including an international arbitration agreement or an agreement involving two foreign parties. There is nothing before me to suggest otherwise. The principles governing the formation of a valid contract, including a contract to arbitrate are no different from those applicable to general contracts. In general, there must be an agreement between the parties as to the 'issue of jurisdiction'. Such an agreement or intention can be established from amongst others, the documents exchanged between the parties. Again, this reference to English law is by virtue of subpara 39(1)(a)(ii).

[90] Thus, the plaintiff' arguments on the application of the principle of estoppel are, with respect, misplaced.

[91] We shall now turn our attention to the purported arbitration agreement, which really is cl 6 of the said contract. From the plaintiff's perspective, the arbitration agreement is housed in this cl 6. It is the plaintiff's case that the Arbitral Tribunal is seised of jurisdiction by virtue of this clause. Clause 6 must now be examined carefully to see if it is valid and is properly invoked. It provides as follows:

> Any disputes or disagreements, which may arise out of this agreement or in relation to it, shall be settled by mutual consultations. If an agreement is not reached, the dispute shall be settled by arbitration in accordance with the regulations and procedures of FOSFA in London and as per the English law. Rules of English law are applicable to the present contract.

[92] Obviously, for our present purpose, the relevant question is whether the dispute on the existence of rebate which was the issue before the Arbitral Tribunal, comes within the ambit of the words 'disputes or disagreements, which may arise out of this agreement or in relation to it …' as found in cl 6. In the decision of *Heyman and another v Darwins, Ltd, 366*, which I had alluded to earlier, there were also the observations of Viscount Simon LC that:

> … in a situation where the parties are at one in asserting that they entered into a binding contract but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect 'of' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer on the arbitral body express power to do so.

[93] It is unarguable that in the dispute before the Arbitral Tribunal, the parties were not asserting that 'a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance'. If that was the case, then quite rightly such a dispute would be over a 'difference' which may be said to have 'arisen in respect of or with regard to or under the said Contract'. More importantly, the parties were and are not at one in asserting that they had entered into a binding contract. The whole object before the Arbitral Tribunal was precisely to establish whether or not there was just such a binding contract to reduce freight charges. It also cannot be denied that while there was the original written contract which formed the principal contract between the parties, the matter of the reduction of the freight did not exist or was not to be found in that contract at all. Instead, if it existed, it was housed in an oral contract concluded subsequently at Istanbul.

[94] While the terms in cl 6 may be said to be wide, they do not encompass the present situation. In my judgment, the dispute before the Arbitral Tribunal to determine the existence of an agreement to reduce freight does not come within the intent and scope of cl 6. It must not be forgotten that the matter of the existence of a freight rebate is entirely dependent on whether a concluded contract arose from the negotiations at Istanbul. This is evident from the affidavits filed (see especially the affidavit of Nakul Rastogi which is not disputed by the plaintiff) and from the terms of the award. At that fateful meeting on 10 April 2010, the delivery of the goods under the pertinent contract, that is the said contract, had already been performed and the price had already been paid. This is undisputed as can be seen from the plaintiff's own email dated 21 April 2009 found in exh 'NR1':

> Dear Mr. Nakul,
>
> during your last negotiations with Mr. Lyashenko it was agreed that freight rate for commodities delivered on tanker 'Miss Marilena' will be 70 USD/MT. At the same time in the contracts PIL-PO-17-09, PIL-PO-19-09 and PIL-PO-18- 08 for commodities delivered on tanker 'Miss Marilena' there was considered freight rate 100 USD/MT. Thereupon we have overpaid for commodities delivered on tanker 'Miss Marilena' 30 USD/MT. While total volume of commodities delivered on tanker 'Miss Marilena' for EFKO group was 14500 mt, total overpayment was 435 000 USD.
>
> The commodities from 'Miss Marilena' are already delivered, and paid (98%), that's why we would like to use overpayment mentioned above for payment for commodities from tanker 'Orinoco Star'. As the contract for 6000 mt of commodities for 'Food Ingredients LLC.' haven't been concluded yet, we would like to consider overpayment 435 000 USD pro rata in contract price of commodities for 'Food Ingredients LLC.'
>
> Consequently we would like the cost of commodities delivering for 'Food Ingredients LLC.' on tanker 'Orinoco Star' to be reduced on 72,5 USD/mt.

> Please confirm our calculations and send us contract PIL/PO/20/09 revised accordingly.
>
> Thank you in advance for your cooperation.
>
> Best regards,
>
> Antonina Likhodedova
>
> Tropical Oils Procurement Department
>
> EFKO Group
>
> teL/fax: +7 4732 39 63 14
>
> a.lihodedova@efko.org

This position was echoed in Mr EV Lyashenko's email/letter dated 23 April 2009 and 5 June 2009 as well as in the plaintiff's lawyers' letters to the defendant.

[95] At that meeting, the parties also discussed and negotiated on several other contracts. The present said contract was but one of those many contracts. Once again, this is apparent from the correspondence exchanged between the parties, including the email referred to earlier. At that meeting too, the parties are said to have agreed on the plaintiff being given freight rebates. The existence of that agreement was obviously what the Arbitral Tribunal was tasked to determine. That agreement, if one existed, is as I have opined earlier, at best, an oral contract made long after the original contract had been performed and all matters related to it, performed and settled. But, that oral contract would be an agreement on freight rebates which is not the concern of this court today.

[96] This court is concerned with whether there was or is a valid arbitration agreement. It is fundamental in the law of arbitrations that there must be clear unequivocal terms of consent to arbitration. This can be found from the salutary decision in *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 where the House of Lords was of the opinion that:

> … the Court of Appeal rightly relied upon the decision in *Hamilton & Co v Mackie & Sons* (1), and that, if it be desired to put upon holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter party; it must be done explicitly.

[97] There are several decisions, particularly decisions from the English courts which have come to similar conclusions. See *Federal Bulk Carriers INC v C Itoh & CO Ltd & Ors* [1989] 1 Lloyd's Rep 103; *Manchester Trust v Furness* [1895] 2 QB 539. Although these decisions concern the provision of resolution of disputes by reference to arbitration in the bills of lading and contract of charter-parties, the decisions have consistently reminded that there must be

clear expressions on the agreement to settle by arbitration. To my mind, the principle applies equally to any other contract. There must be explicit evidence of this intention to refer the dispute in question to arbitration.

[98] Hence, for there to be a valid arbitration agreement, there must be express agreement in the said contract to that effect. In other words, there must be evidence of the parties' intention to extend the terms of the said contract, particularly cl 6, to the collateral or subsequent oral contract. Alternatively, there must be evidence before me of the parties' agreement in the oral contract itself of express intention to incorporate the arbitration clause in cl 6 into the subsequent oral contract. In short, there must be evidence now before this court that the parties had agreed in Istanbul that any dispute on the freight rebate or reduction will be resolved by arbitration.

[99] From both the submissions of learned counsel and the affidavits filed by the parties, especially the plaintiff, that at no time was there any such consideration on the matter of arbitration. All that the plaintiff contends is cl 6. Everything harps back to cl 6. It is my considered opinion that cl 6 has in fact no application simply because it governs matters arising from the said contract or is related to the said contract. The matter of the freight reduction is one found, if at all, in the contract made in Istanbul and not, in the original contract. It does not arise nor is it related to the original contract for the reasons already addressed.

[100] Although not directed on the present facts, the decision of Steel J in the related case of *Pacific Inter-Link Sdn Bhd v EFKO Food Ingredients Ltd* [2011] EWHC 923 (Comm) is useful. That was a challenge under s 67 of the 1996 Act. After going through the evidence, Steel J rejected the suggestion that there was an oral arbitration agreement and also found that there was no binding arbitration agreement as claimed.

[101] From my perusal of the evidence before me, especially the emails and the written submissions of the parties, I also do not find any agreement between the parties that the settlement of the dispute in question shall be by arbitration. The mere fact of the parties submitting to the Arbitral Tribunal is insufficient to cloak the tribunal with jurisdiction to hear and determine the dispute between the parties as to whether there was an agreement to grant freight rebates. Mr Nakul Rastogi has affirmed in his affidavit what had transpired at the meeting held in Hotel Swissotel Boshphorus in Istanbul. Nowhere does he say that the parties had agreed that any dispute between them would be resolved by arbitration. In fact, it was always the defendant's position that a memorandum of understanding ('MOU') had to be drawn up in respect of the freight reduction. Having examined that draft, it is evident that there are no provisions on arbitration in that draft MOU. Although that draft MOU

remained in its draft form, it may be taken into consideration as supporting the defendant's contention that there was no arbitration agreement as averred at para 8 of the affidavit of Mr Nakul Rastogi. There is no response from the plaintiff on this except its entire reliance on cl 6 to confer jurisdiction and mandate on the Arbitral Tribunal and, ss 31 and 73 of the English Arbitration Act of 1996. Unfortunately, that is insufficient. There must be clear party choice and agreement specifically on this. There is none.

[102] I also do not find any evidence of the parties agreeing that the terms of the said contract, in particular cl 6 be incorporated into the agreement on freight reduction.

[103] Under these conditions, I can only find that there is in fact no arbitration agreement. It does not exist. In a sense, the validity of that agreement is therefore, not even an issue. To me, the terms as found in cl 6 cannot include the circumstances of arbitrating the existence of an agreement on freight rebate before the Arbitral Tribunal. Since there is no arbitration agreement, and cl 6 of the said contract cannot validly incorporate the particular dispute before the Arbitral Tribunal, there was therefore no valid arbitration agreement from which the Arbitral Tribunal may properly and validly render the award, or any award for that matter.

[104] Lastly, I observe that if there was any agreement on arbitration, it is necessarily oral and would have formed part of the oral agreement to reduce freight. This is insufficient for the court to grant the order of recognition and enforcement sought by the plaintiff. In the context of Act 646, there is no room for oral arbitration agreements as can be inferred from para 38(2)(b). The arbitration agreement must be a written agreement. Again, this approach is consistent with that adopted in other jurisdictions as can be seen from the cases already discussed.

[105] In the circumstances, I am satisfied that the defendant has discharged the burden of proving on a balance of probabilities that the two arbitral awards ought to be refused recognition or enforcement for the reasons relied on. The plaintiff's application is therefore dismissed with costs as proposed by counsel, that is the sum of RM10,000 to the defendant in each application.

Applications dismissed with costs.

Reported by Ashok Kumar